MATERIALS ON CONFLICT OF LAWS

Volume ID

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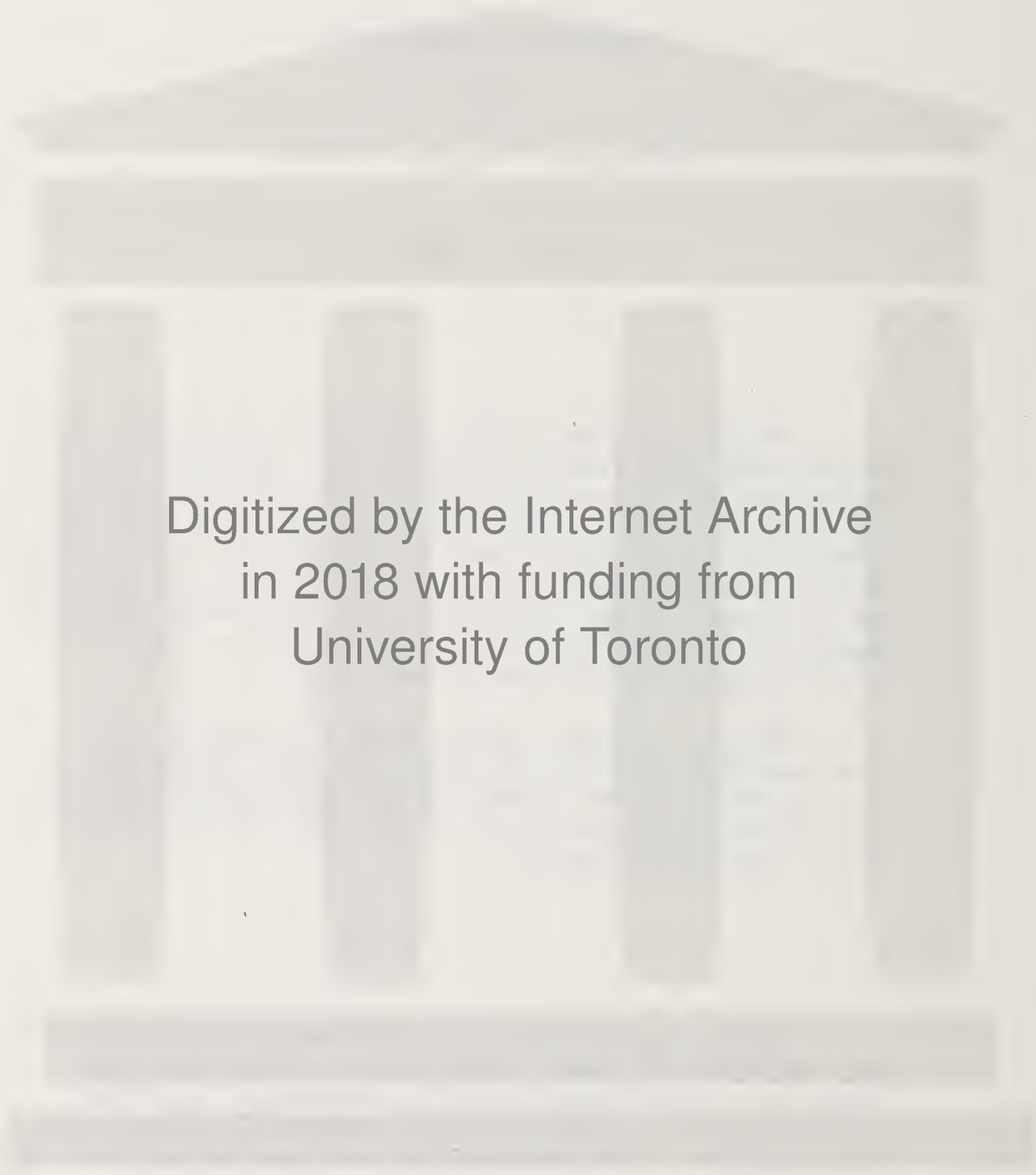

PART B

I. JURISDICTION TO ADJUDICATE

1. INTRODUCTION

In any judicial proceeding the defendant may argue that the court should not hear the case which the plaintiff has brought before it. The claim is that the court lacks jurisdiction to hear the case. The presence of foreign facts has an important bearing on the question whether a court should or should not take jurisdiction. The sources of the rules for taking jurisdiction (or for refusing jurisdiction) are found both in statutes and the common law. For example, the Divorce Act, 1985, (S.C. 1986, c. 4, s. 3) provides that jurisdiction to dissolve a marriage may only be taken where either the petitioner or respondent meets certain residency requirements in the province where he or she brings the petition. The common law rules, which govern matters such as claims in contract, tort and property, are more complex and we shall spend some time investigating them. The bulk of our discussions will focus on actions in personam. The distinction between such actions and actions in rem will be explained at the end of this chapter.

It is first necessary to dispose of some preliminary issues. The Canadian courts of general jurisdiction are the courts that are the lineal descendants of the original common law courts. Thus in Ontario the court of general jurisdiction is the High Court. In other provinces, British Columbia and Nova Scotia, for example, it is the Supreme Court, or Trial Division of the Supreme Court of Province. In others, it is the Court of Queen's Bench. Other courts, such as the District Court or County Courts, and of course, the Court of Appeal and Supreme Court of Canada, are courts of limited jurisdiction. What the difference means is that, in general, a defendant has to show that a court of general jurisdiction should not hear the case if the plaintiff has brought his action there, and that the source of the rules upon which the defendant will rely is the common law. For the other courts the plaintiff (or appellant) may either have to convince the court that it should hear the case (e.g. leave must be obtained to appeal to the Supreme Court) or, if challenged by the defendant, show that the statute empowering the court to hear the case properly applies. Our examination will focus almost exclusively on the jurisdiction issues raised by the existence of geographically complex facts in actions begun before provincial courts of general jurisdiction. It is a fact that the bulk of conflicts cases come before such courts.

Jurisdiction. Introduction...

The position of the Federal Court of Canada will not be extensively discussed in these materials, though we shall consider some special problems that its existence creates for the development of a federal approach to Conflicts and the potential impact of that on some constitutional issues central to our analysis. That court has (or, at least, arguably should have) a special role to play in conflicts cases. Its special jurisdictional rules, however, will not be examined here. (For a discussion of the Federal Court see: Laskin and Sharpe, "Constricting Federal Court Jurisdiction: A Comment on Fuller Construction" (1980), 30 U.T. L.J. 283 and, for an explanation of the federal courts in American law, Bator et al. (Eds.), The Federal Courts and The Federal System (Minneola; N.Y.: Foundation Press, 1973.)

It is very important to remember that there is a close relation between issues of jurisdiction and choice of law. We would have no need for choice of law rules if no court took jurisdiction in a case that presented geographically complex facts. Conversely, the greater the willingness of a court to hear cases with geographically complex facts, the greater the need for choice of law rules. The kind of choice of law rule that is adopted may either encourage or discourage resort to the court of one jurisdiction rather than another. It is fairly obvious that a rule of the Phillips v. Eyre type may well encourage a plaintiff to seek an especially favourable forum in which to litigate her dispute. In such a case jurisdictional rules become more important, particularly if we think that a plaintiff's choice of the court in which to sue should not have any very substantial impact upon the disposition of the case.

As a simple matter of what is practically necessary, courts cannot refuse to hear cases in which the relevant facts are geographically complex. It would be unfair to deny someone like Mrs. McElroy a forum in which to litigate her dispute with her husband's employers - though the Scottish courts' taking of jurisdiction did not do her much good in the end. This means that we have to face the problems arising from the need to handle such cases.

The close relationship between the breadth of jurisdictional rules and the need to develop choice of law rules suggests that the factors underlying jurisdictional rules should, at least in some respects, be the same as the factors underlying choice of law rules. The question whether jurisdiction should or should

not be assumed and the question whether forum law should or should not be applied are parallel questions; both ask `what moves us to apply, or to refuse to apply, our legal system to the dispute at hand?´ The answer to these questions may be partially provided by considering why courts might be led, in certain cases, to refuse jurisdiction. Both the limits on assumption of jurisdiction and the rules which at times cause a court to apply foreign law indicate something very basic about systems of law, or sets of rules.

Each jurisdiction, with its own particular set or system of rules, is limited geographically, in the sense that its laws were developed to cope with problems in that jurisdiction, i.e., in cases that are not geographically complex. No one set of rules can reasonably have the hubris to assert that it represents legal or moral perfection, or absolute justice. It is partly because of this non-absolutism of legal systems that jurisdictional limits are necessary. It is also the case that no jurisdiction desires to provide a judicial forum for all the world. For example, an Ontario court might consider refusing to hear a case involving a British plaintiff injured in a motor vehicle accident which occurred in Britain because of the alleged negligence of an American driver. Similarly, if a court does accept jurisdiction in such a case it might embark on a choice of law process. This freedom to choose laws, instead of simply to apply the substantive law of the forum, seems justified by the weakness of the geographical nexus between the forum and the facts of the case. A decision to apply a foreign rule of law is in effect an admission that the forum law is neither absolute perfection nor universally appropriate. That is, there is a sense of geographical limits on a particular jurisdiction´s sense of justice and of order. There is a question as to how far afield a particular rule of law can be sensibly applied.

We mentioned in the Introduction that there may sometimes be disputes arise over what it means to say that a court "applies" its own rules or those of some other jurisdictions. These disputes are about something that, in one sense, is little more than a semantic quibble. We need, as we said earlier to be able to distinguish between domestic rules of decision and rules that might make reference to, or perhaps, incorporate ideas, concepts or solutions form other jurisdictions. What we have to focus on is the source for the criteria used by the court to deal with a particular problem. Will these criteria be found in decisions of the forum court in cases that were not geographically complex or in rules of another jurisdiction in similar cases? (We shall see later that perhaps these decisions of both courts are inapplicable in a case that is geographically complex. If this argument is valid a conflicts case may properly justify the use of a criterion that is not the same as any decision reached by any court in a case that is not geographically complex.)

Jurisdiction. Introduction...

Thus far we have speculated about some of the limits which inhere in particular bodies of law; such speculation helps us to begin to formulate a rationale for limits on the assumption of jurisdiction and on the application of forum law. At this juncture we should briefly examine present jurisdictional rules, both because of their practical importance and because a familiarity with these rules will facilitate a critical appraisal of how they interact with choice of law rules. It should be emphasized that the following summary of jurisdictional rules is incomplete; it does not purport to cover the very complex procedural question involved in the law of assumption of jurisdiction. Rather, it is offered as a base from which you can begin to consider jurisdictional limits as a possible alternative, in some cases at least, to choice of law. Bear in mind that the jurisdictional rules were not fashioned with choice of law rules specifically in mind.

For an excellent general discussion of the issues of judicial jurisdiction, albeit at least partly from the perspective of the American Constitutional position, see, Von Mehren and Trautman, "Jurisdiction to Adjudicate: A Suggested Analysis" (1966), 79. Harvard L. Rev. 1121. A much briefer, but excellent discussion of Canadian law is found in Sharpe, Interprovincial Product Liability Litigation (Toronto: Butterworths, 1982).

The basic position from which to start any analysis is that the jurisdiction of any court is territorial. This statement means that the Nova Scotia Supreme Court, for example, has jurisdiction over those who are properly served in Nova Scotia. Service in Nova Scotia is required because the form of the writ of summons[1] that started common law actions for several centuries. That form was that of a command of the sovereign directing the defendant to answer the plaintiff's claim. Only those subject to the sovereign could be brought before the courts of that sovereign, and sovereignty was seen as essentially territorial. The notion of citizenship was a much later development, one which had its origins as an importnat aspect of international law in writings in the civil law tradition.

The law now is that any one who is properly served in Nova Scotia is subject to the jurisdiction of the Nova Scotia court. The question of what is proper service is established by the Rules of Court. Generally speaking, and subject to the rules to be discussed shortly, proper service requires personal service.

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[1] The replacement of the old Writ of Summons by an originating process under the new Ontario Rules of Civil Procedure has no impact on this theoretical background.

The notion of personal service as applied to an individual is fairly easy to understand: it is the delivery of the writ into the hands of the defendant and the subsequent execution of an affidavit of service. Many potential defendants are, of course, not individual human beings but corporations of one kind or another. As regards these bodies special rules are required. The details of these rules are not important for our purposes here. The rules of court can be checked to determine what is necessary. See, Ontario, Rules of Civil Procedure, Rule 16.01. British Columbia, Rules of Practice, Rule 11(2), Nova Scotia, Civil Procedure Rules Rules 10.03, 10.04.

2. RULES GOVERNING THE TAKING OF JURISDICTION

Geographically complex cases present the courts with four general problems:

1. Are there any rules which disable the court from hearing the case at all?

2. Should the court, as a matter of justice and fairness to the litigants, refuse to hear a case even though the defendant has been properly served in the jurisdiction?

3. To what extent is a court justified in asserting a power to hear a case in circumstances when the defendant is outside the borders of the court's jurisdiction?

4. Should the court enjoin one of the parties from continuing with proceedings she may have launched in a foreign court?

(a) Rules Excluding the Jurisdiction of the Courts

(i) Personal Exclusions

The principal exclusion in this category relates to the rules regarding sovereign immunity. A Canadian court cannot assert jurisdiction over foreign sovereigns or their representatives.

The topic will not be extensively explored here: it is more properly an issue of public international law. The question is governed by legislation in Canada, see State Immunity Act, S.C. 1980-81-82, c. 95 (Canada Gazette Part III, June 22, 1982, p. 2949) and Diplomatic and Consular Privileges and Immunities Act, S.C. 1976-77, c. 31 (as am. S.C. 1980-81-82, c. 74); in the United States, see Foreign Sovereign Immunity Act, 28 U.S.C. §1602; in the United Kingdom, see State Immunity Act 1978, c. 33 and The Diplomatic and Other Privileges Act 1971, c. 64, Schedule; and see European Convention on State Immunity 1972, 11 I.L.M. 470 (in force 1976). See also Bouchez, "The Nature and Scope of State Immunity from Jurisdiction and Execution" (1979), 10 Neth. Y.B. Int'l L. 3. As the title of this article indicates it may be possible to get a court to take jurisdiction in the face of an argument that the defendant is a foreign sovereign, but another matter altogether for the successful plaintiff to be able to recover on the judgment by a writ of seizure and sale. You should simply note that the problem of sovereign immunity presents both issues.

Most of the recent cases arise from the increasing use by governments of national trading organizations. A socialist country like the U.S.S.R. conducts all its international commercial relations through state trading corporations. These organizations are not entitled to sovereign immunity, and there are exclusions in the legislation for such organizations. Environmental disasters like the oil pollution in the Bay of Campeche caused by the blow-out of an oil well drilled by Pemex, the Mexican state oil corporation, create serious jurisdictional problems, for the damage may be done over a wide area, and the potential defendant may be protected by sovereign immunity.

(ii) Subject Matter Exclusions

The power of provincial courts to hear cases may be limited by a number of factors. The first two limits arise from the history of the grant of self-government to the colonies that eventually became Canada and from the nature of the Canadian Federation. The common law courts of England had, for example, no power to grant divorces. The courts that existed in provinces for which the "cut-off" date for English law was earlier than 1857, (the year when the British Parliament first gave the courts power to dissolve marriages) shared this disability: they had no power under the common law to grant divorces. The colonial Assemblies of New Brunswick and Nova Scotia had given their courts power to dissolve marriages. Courts in the Western provinces which did not cut themselves off from the effect of English law until after 1857 had this power under their reception of the English law (including English statute law) at the date of their creation and the grant of self-government. After Confederation and as a result of the federal jurisdiction over marriage and divorce, no province could introduce legislation to give their courts jurisdiction to grant divorces. The unsatisfactory patch-work of provincial jurisdiction in this area was finally resolved by the Divorce Act of 1967. Petitions for divorce must now be brought under the provisions of the Divorce Act, 1985, S.C. 1986, c. 4, s. 4.

A second limitation may arise because the jurisdiction may be given by federal legislation to some other court. Thus provincial courts have no jurisdiction over the matters under the exclusive jurisdiction of the Federal Court of Canada. The Federal Court Act, R.S.C. 1970 (2nd Supp.) c. 10, confers jurisdiction on the Federal Court in taxation matters, actions against the federal crown and federal administrative agencies. The principal issue for conflicts purposes is the exclusive jurisdiction of the Federal Court under the law of admiralty. It has been held that a provincial court has no jurisdiction regarding a claim arising from a collision between two ships at sea: Cull v. Rose (1982), 37 Nfld. & P.E.I.R. 476, 139

D.L.R. (3d) 559 (Nfld. S.C. T.D.). For some other, and somewhat exotic problems, see ITO - International Terminal Operators Ltd. v. Miida Electronics Inc., [1986] 1 S.C.R. 752, 28 D.L.R. (4th) 641 - a case to which we shall return.

A third exception, and one that has particular relevance for conflicts is the rule that a court (sc. a provincial court of general jurisdiction) cannot hear an action regarding a claim to foreign land. This rule is based on the following case.

Notes and Questions

1. In both Mocambique and Albert v. Fraser Companies there was no other court that offered any effective relief to the plaintiff. In the former case there was simply no court at all, and in the latter, there was the serious risk, as we shall see when we examine the topic of the Recognition and Enforcement of Foreign Judgments, that any judgment Mme Albert obtained in Québec would not be enforceable in New Brunswick.

2. Notice again the result of the adoption by Canadian courts of English rules. Lord Herschell in Mocambique gives some reasons that he considered justified the English courts in not taking jurisdiction in actions involving foreign land. Suppose that the decision of the New Brunswick Court of Appeal were to be appealed to the Supreme Court of Canada, to what extent are the arguments of the majority, based on Mocambique applicable then?

3. It is tempting to suggest that the result in Mocambique may have done something to "paint the map of Africa red from the Cape to the Mediterannean." The British South Africa Company, with De Beers Consolidated Mines, was one of Cecil Rhodes' vehicles for the development of South Africa. He was the Prime Minister of the Cape Colony at the time of the judgment in the case.

4. A more recent case before the House of Lords which must have caused it acute embarrassment is the following case. (The judgments have been heavily edited.)

Notes

1. Dicey & Morris summarize the Mocambique rule: (Rule ** 77):

> Subject to the Exceptions hereinafter mentioned, English courts have no jurisdiction to entertain an action for
>
> (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land); or
>
> (2) the recovery of damages for trespass to such immovable.

The rule is commented on by the editors: (most footnotes have been omitted: those that remain are in the text in square brackets)

> The Judicature Act 1873 and Rules of Court made thereunder abolished local venues, and accordingly it was arguable that there was no longer any reason why English courts should not decide questions of title to foreign land or at least grant damages in personam for trespass thereto.
>
> But in British South Africa Co. v. Companhia de Mocambique the House of Lords decided that "the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical, and that the rules of procedure under the Judicature Acts have not conferred a jurisdiction which did not exist before." [[1893] A.C. 602, 629] In Hesperides Hotels Ltd. v. Aegean Turkish Holidays Ltd., [[1979] A.C. 508] the House of Lords was asked to depart from the Moçambique rule, but decided not to do so. Lord Fraser conceded that the result might be that the plaintiff would be left without a remedy; that it was difficult to justify the rule except on historical grounds; and that it was neither logical nor satisfactory in the result. [At pp. 543-544] The House of Lords also held (1) that the rule could not be circumvented by framing the action so as to claim damages for a conspiracy in England to procure acts of trespass to land situated abroad; and (2) that the rule does not prevent an action for damages for trespass to chattels in a building situated abroad. ... It has been held in Canada that the rule does extend to torts other than trespass. [Brereton v. Canadian Pacific Railway (1897), 29 O.R. 57; Albert v. Fraser Companies, [1937] 1 D.L.R. 39; criticised by Willis (1937), 15 Can. Bar. Rev. 112; contrast Malo and Berthrand v. Clement, [1943] 4 D.L.R. 773, where the action was entertained although title was in issue.]

If the Mocambique rule is one of policy, as it was held to be in the leading case, the better opinion would seem to be that it cannot be waived by any agreement between the parties.

2. The following exceptions are generally admitted to the rule:

(a) where the court has jurisdiction in personam because of a contract (see Companhia de Mocambique v. British South Africa Co., [1982] 2 Q.B. 358, 364), fraud (Burns v. Davidson (1892), 21 O.R. 547 (C.A.)) or trust (Hawks v. Hawks (1921), 59 D.L.R. 430 (S.C.C.)), [1921] 3 W.W.R. 285, affirming [1920] 3 W.W.R. 774, 56 D.L.R. 265 (Can.);

(b) where the court has jurisdiction to administer an estate or trust which includes movables or immovables in Canada (Re Ross, [1930] 1 Ch. 377), as well as foreign land; and

(c) where the court has jurisdiction in rem against a ship (Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 22(2)(3), s. 43.